314; Story on Promissory Notes, §390, note 1; Parsons on Bills and Notes 648.[1]

A decree in accordance with this opinion will be entered.

Affirmed by Mr. Justice NELSON, on appeal, August 1865.

[1] See the case of *The Ship Rochambeau*, 26 Boston Law Reporter, p. 564, in which Judge WARE, of the District Court of Maine, held that a seaman shipped on board of an American ship at St. John's, New Brunswick, for a voyage to London and back, and afterwards serving on board under such contract, might recover, in the United States, double his stipulated wages; gold then being at a premium of 100 per cent.

Supreme Court of Pennsylvania.

THE NORTH PENNSYLVANIA RAILROAD CO. *v.* CHARLES REHMAN.

A railroad company has the exclusive right of way along its track, and, in Pennsylvania, is not bound to provide fences to keep out cattle.

Hence, if domestic animals wander on the track, whether with or without the owner's knowledge, and are killed without wantonness or gross negligence of the railroad company, the latter will not be responsible in damages for their death.

The fact that the point where they were killed was at the intersection of the railroad with a public highway does not change the rule. A highway is public for purposes of *travel* only, and cattle wandering unattended are not within the class to whose protection the railroad company is bound to look in crossing.

WRIT of error to the District Court of Philadelphia.

Morton P. Henry, for plaintiffs in error.

R. P. White, for defendant in error.

The opinion of the court was delivered by

THOMPSON, J.—It was conceded on argument that the law is settled in this state, that if cattle are suffered to run at large, and are injured or killed on the track of a railroad, without wantonness, or such gross negligence as might amount to the same thing, the owner has no recourse against the company or its servants: *Railroad Company* v. *Skinner*, 7 Harris 298.

Two elements are said to exist in this case, which it is supposed modify, or perhaps render inapplicable altogether, the rule of that case, so far as it is concerned, namely that the mules in

question were not turned out to roam at large, but were put into a field with a good fence around it, on the evening previously to being killed, and escaped thence without the knowledge of the plaintiff; and secondly, that when they were struck by the defendants' engine they were on the crossing of the public road over the railroad.

Do these elements distinguish the case in principle from *Skinner's Case?* I do not think they do. It is asserted in that case in the clearest terms, without exception or limitation, in regard to the crossing of roads or streets, that cattle roaming on the track of a railroad are trespassing as regards the company, and if they were killed without wantonness or gross carelessness the company is not to be answerable for the loss. Chief Justice GIBSON said: "The company is a purchaser, in consideration of public accommodation and convenience, of the *exclusive* possession of the ground paid for to the proprietors of it, and of a license to use the greatest attainable rate of speed, with which neither the person nor property of another may interfere." This was a well-considered case; the doctrine is announced as of general application, and as such it has been generally accepted by the people, who have long since, in the neighborhoods of railroads, especially in the thickly-settled parts of the state, endeavored to conform to it. It was undoubtedly by the application of the common law rule, which requires the owners of cattle to restrain them from trespassing at their peril, that this conclusion was reached. That this is the rule, see *Dovaston* v. *Payne*, 2 H. Bl. Rep. 527; 12 Eng. Law & Eq. Rep. 520, in note; 25 Id. 373; Shelford on Railways 470, note 1; 5 Comstock 349; 4 N. H. Rep. 36, 512.

It is true, by custom in Pennsylvania, owners of cattle are not liable to be sued for trespass on account of cattle roaming on unenclosed wood or waste lands. But to permit such roaming is hardly a right; it is a privilege or immunity rather, growing out of the inappreciable damage that would be done: *Railroad* v. *Skinner*, *supra*, and *Knight* v. *Abert*, 6 Barr 492. The maxim *de minimis*, in this particular, controls to avoid vexatious suits.

In trespass the rule undoubtedly is, that intent or ignorance is no defence. It does not *condone* the injury. Whether the damage be great or small, it is the unauthorized act which creates the liability; the damage is but an incident of the wrong. In

harmony with this idea is the common law requirement, that every one must exercise his rights and privileges so as not to injure others. Hence animals which have the propensity to trespass by breaking into enclosures must be restrained at the peril of paying for their trespass by their duress: *Dolph* v. *Ferris*, 7 W. & S. 367.

It is settled with us beyond doubt, that railroad companies are not bound to fence against cattle; and by the decision already cited, and many others, that such companies have, and it is necessary to their existence that they should have, the complete and exclusive possession and entire control of their tracks, and entitled, as against anybody and everything not lawfully on their road, to a clear track. It is quite apparent if they are not obliged to fence against roaming cattle, that they are at the mercy of the public, unless the law will protect them. Railroad tracks are neither woodlands nor waste fields, and are not within the usage as to roaming cattle on such land. The common law steps in to protect the road, and to protect those upon it, and, as in *Skinner's Case*, declares vagrant cattle upon it as trespassers. There are many authorities to this effect in England and in this country, but a few only will be referred to: 2 Eng. Law & Eq. 289; *Tonawanda Railroad Company* v. *Munger*, 4 Comst. 349; *Perkins* v. *Eastern Railroad Company*, 29 *Me.* 307; Shelf. on Railways 507; 2 N. Jersey 185; *Avery* v. *Maxwell*, 4 N. H. 36; *Mills & Stark*, Id. 514; *Tewksbury* v. *Bucklin*, 7 Id. 518. And it is also expressly laid down in many authorities that where no requisitions to fence exist, such companies are governed by the rule of the common law. In addition to the cases just cited, in which is contained this doctrine, see also 1 Amer. Railway Cases 144, 212, 213, and note. Indeed the result is inevitable. A railroad in this state could not coexist with the preservation of the usage to its full extent. Their speed would be destroyed in their attempts to keep the track clear, and the lives of passengers put in jeopardy constantly, if they should disregard such precaution, as well as being subjected to what it would cost to pay for cattle killed or injured in case of disregarding it.

Whether, therefore, the plaintiff's mules escaped from an enclosed field or not, in view of the trespass on the defendants' road, I do not think makes any difference in this case. It was undisputed that they were on the defendants' road without its

license. If so, they were there wrongfully—were trespassers. How can the owner separate his case from the wrong done by his cattle? Intention, nay, effort to prevent, will not make their occupancy of the track of the road lawful. If they were in fault it was because their owner was in fault in not restraining them. He was bound to do it at his peril. He did not restrain them so as to prevent them being in the way of the defendants, and I see not how he can lawfully demand compensation, in such an aspect of the case, without a repudiation of the axiom, that where there is mutual fault or negligence neither party can recover from the other. The case of *Knight* v. *Abert*, 6 Barr 472, illustrates this idea. The plaintiff's cattle were wandering on the woodlands of the defendant; one of them fell into an ore-pit and was killed. The owner charged negligence on the defendant for leaving it open, and the defendant replied that his cattle were trespassing, and he was not bound to take care of them, or to run the risk of injury if they came on his place without leave. This was held to be a good defence, GIBSON, C. J., saying: "He who suffers his cattle to go at large, takes upon himself the risks incident to it." So we think in this case the risk was on the plaintiff, and if his cattle were not killed in wantonness or by gross neglect he must abide the law. There was not a particle of evidence of this in the case.

These views we think meet the first aspect of the case; but it was insisted in argument that the mules were on the common highway, at the point where it crosses the railroad, when they were killed by the defendants' engine and train, and therefore not trespassing. Highways are established to accommodate travel alone, and it can hardly be that unattended and loitering cattle are within the class. True, they may not be taken up as strays because on the highway; nor the owner sued for trespass for that reason alone; but unreasoning and dumb, it is absurd to think of them in reference to rules governing the enjoyment of the easement of passing and repassing on a highway, among which is the duty to take care of the rights of others and their own safety. Such being the case, as a general thing, it is negligence to permit them to wander where they may do, as well as receive, injury. This subject has received judicial notice in more than one case. In *Dovaston* v. *Payne*, already referred to, it was held in a plea in bar of an avowry for taking cattle *damage feasant*, that the

cattle escaped from a public highway into the *locus in quo*, through a defect in the fences, must show that they were *passing* along the highway when they escaped, and that it was not sufficient to aver that "*being* on the highway they escaped." BULLER, J., said, whether the plaintiff was a trespasser or not depends on the fact whether he was "passing or repassing and using the road as a highway, or whether his cattle were in the road as trespassers;" and that it was fatal to the plea to omit the averment of *passing* on the highway at the time of the escape into the defendant's close.

So in 4 Ellis & Black. 860, it was held that a person was rightly convicted of trespass under the statute of 1 & 2 W. 4, in regard to game, although he was in the highway when he fired at the bird as it flew over it. The ruling was, that as the evidence showed that the defendant was not in the road in the exercise of the right of way, but for another purpose, viz., in search of game, he was a trespasser on the lands of the adjoining owner through whose lands the road lay, and over which the public had only an easement for the purposes of travel.

In *Avery* v. *Maxwell*, 4 N. H. 36, cited *supra* for another purpose, it was held that no one has a right to turn his horses or cattle into the highway to graze, except in those parts where he is the owner of the soil. And if a horse be turned into a road at another place, although fettered as required by law, if he escape into an adjoining close, *through a defect of fences* which the owner was bound to repair, yet the owner of the horse would be liable for the trespass. The same principle was asserted in *Mills* v. *Stark*, same book, and several authorities are to be found in a note on the same subject in Shelford on Railways 507. We have numerous cases to the same effect in principle in our reports: 1 Y. 167; 9 S. & R. 32; 6 W. & S. 378; 1 Barr 336; 8 Id. 294.

The learned judge below left the question of due care, on part of the plaintiff in regard to his cattle, to the jury: telling them that if he was not guilty of negligence in that respect; in other words, if his field was sufficiently fenced in which he turned his mules, and they escaped and were killed on the highway by negligence of the servants of the company, they would be liable to pay for them. In view of the authorities and reason already given, we think this was wrong. It seems to us that the company is as much entitled to a clear track at crossings, subject only to

the right of travellers, as anywhere else; and if *couchant* or loitering cattle on such crossings have any legal rights as such, I am at a loss to discover from whence they are derived. The authorities are almost universally against the assumption. I do not mean by this that they may be wantonly destroyed even in such places, or that gross negligence in regard to them will be excused. Neither would it be excused in regard to trespassing cattle on enclosed fields. They may not be killed or their safety entirely disregarded in that case. With this reservation, arising out of sentiments of humanity and social duty, the law accords, but to go further would be to release owners from the appropriate care due to such property, and to injure the community in doing so.

Both the points I have thus noticed are embraced in the questions reserved by the court, but which it ultimately decided against the defendant. They are: "1. That under the undisputed evidence in this case, as the plaintiff's mules were killed while straying upon the defendants' track, the defendants are entitled to a verdict."

"2. That owners of cattle killed while straying upon a railroad cannot recover damages from the company."

I do not suppose that these points were overruled because not properly qualified by the reservation, that cattle must not be killed wantonly, or by such gross negligence as to amount to the same thing. There was nothing like that in the evidence; indeed it seems to me there was very slight evidence of any negligence whatever. Treating it therefore as a case of ordinary negligence at most, the question is, could the plaintiff, under the circumstances, recover? To say he could, is to affirm these points; and in doing so, to affirm that straying cattle, standing, lying, or browsing on the track of a railroad, are lawfully there, so as to exonerate the owner from all blame if he can show he was ignorant of their escape from his custody. We think we have shown that this is not the law; and I am sure if it were it would encourage carelessness in regard to the care of animals, increase litigation, and greatly enhance the perils of railroad travel. The only way to secure the greatest safety in such a mode of travelling is to hold all obstructions unlawful. Ordinary passage by the public over a railroad, on a public highway, is in no sense an obstruction, nor is the passage with droves or horses usually; but

it is an unauthorized obstruction for roaming beasts to be there, and as the duty is on the owner to keep them away, he is in fault in failing to perform the duty, and cannot recover, even if there was negligence on part of the railroad company's servants in killing them. Where there is mutual contributing negligence, neither party can recover for its consequences. The public have accepted the doctrine of *Skinner's Case*, and have, to a considerable extent, adapted their circumstances to it, and are constantly conforming more and more to it; but I am persuaded that the exception which this case would introduce, were we to affirm it, would, in the end, greatly impair if not entirely overthrow the rule itself, which I think all will admit was most wholesome.

The case of *Bulkley* v. *The New York and New Haven Railroad Company*, 27 Conn. Rep. 479, has been examined, and I do not think it entitled to the weight given to it below. If I understood the opinion of ELLSWORTH, J., the plaintiff in error failed to raise the questions of law which really belonged to the case. Certain it is, the case seems to have been but little discussed. Besides that, the railroad company seemed to have been in default in not constructing cattle-guards at the crossing of the public road, as they were bound by their act of incorporation to do, and the plaintiff's cattle being at large not in contravention of their statute on that subject, the court below left it to the jury to say whether the plaintiff had exercised "ordinary care" in view of all the circumstances. It is certainly true that what is "ordinary care" varies essentially with circumstances. If a railroad were bound to fence against cattle, the rule of care would be very different from that where they were not bound, and where the law declared they were entitled to a clear track. We hold that in the latter case the owner of the cattle is bound at his peril to keep his cattle off the railroad, and if he do not, the law treats him as negligent and not entitled to recover, excepting only in case of wanton injury or by gross carelessness.

We think judgment should have been entered in favor of the defendants, *non obstante veredicto*.